ABDUL HAMID BIN HAJI RAHMAT & ANOR.

v.

DEVELOPMENT & COMMERCIAL BANK BHD. & ANOR.

HIGH COURT, JOHOR BAHRU
DATUK L.C. VOHRAH J.
[CIVIL SUIT NO. 22-129/1991]
8 OCTOBER 1992

PRACTICE AND PROCEDURE: Application by second defendant to strike out writ and statement of claim as, inter alia, being frivolous, vexatious and an abuse of the process of the court - Order 18 r. 19, Rules of the High Court 1980 - Writ and statement of claim alleging summary judgment in earlier suit obtained by second defendant by fraud and perjured evidence - Whether matter res judicata - Whether matters alleged by the second plaintiff had already been raised in earlier suit - Whether there was fresh information warranting setting aside of judgment.

The first defendant had obtained a summary judgment in a suit brought by them against the plaintiffs, as guarantors of banking facilities granted by the first defendant to a company of which the the plaintiffs were directors. An appeal was heard on the merits and was allowed, and an order for conditional leave to defend granted. On the plaintiffs failing to comply with the order, a further order giving final judgment to the first defendant was made. An appeal to the Supreme Court by the plaintiffs against both the orders was dismissed with costs. A subsequent application by notice of motion in the Supreme Court for an order to set aside or vary the two orders with consequential variation of the Supreme Court order, on the ground of misrepresentation by the second defendant, was withdrawn with leave of the Supreme Court.

The plaintiffs then filed a suit, seeking to set aside the further order granting summary judgment against the plaintiffs, on the ground that the judgment had been obtained by fraud by both the defendants and by means of a false statement in an affidavit made by the second defendant, regarding the purchase of certain shares from the first defendant.

The defendants applied to strike out the writ of summons and the statement of claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the Court. Only the second plaintiff contested the application.

Held:

[1] The present suit was frivolous, vexatious and an abuse of the process of the court.

[2] The second plaintiff was estopped from litigating on the allegation of fraudulent misrepresentation on the part of the second defendant regarding the earlier judgment. The facts upon which the second plaintiff was alleging fraud in the present suit were already in issue in the earlier suit. The facts surrounding the share transaction in respect of which perjury was alleged were contained in the statement of defence and in the affidavits in support of and in reply to the application for summary judgment in the earlier suit.

Even allowing for the application of the principles governing reception of fresh evidence, though this was a case where the second plaintiff was attempting to bring a fresh action, the second plaintiff had failed to show that the evidence could not have been obtained with reasonable diligence for use at the previous hearing.

[3] The fact that the earlier judgment was obtained by summary procedure was irrelevant regarding the present application to strike out. The earlier judgment had been obtained after a full hearing on the merits, and had even been considered and approved by the Supreme Court.

[Application allowed with costs.]

Cases referred to:

Kesarmal & Anor. v. Valliappa Chettiar & Anor. [1954] 20 MLJ 179 (refd)

Seng Huat Hang Sdn. Bhd. & Ors. v. Chee Seng & Co. Sdn. Bhd. [1987] 1 MLJ 413 (refd)

Wentworth v. Rogers (No. 5) [1986] 6 NSWLR 534 (refd)

International Corona Resources Ltd. v. LAC Minerals Ltd. McKinnon et al., Intervenors 54 DLR (4th) 647 (refd)

Ladd v. Marshall [1954] 1 WLR 1489 (dist)

Skone v. Skone & Anor. [1971] 1 WLR 812 (dist)

Langdale & Anor. v. Danby [1982] 1 WLR 1123 (dist)

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19

For the 2nd Plaintiff - P. Suppiah; M/s. P. Suppiah & Co.

For the Defendants - C.V. Das; M/s. Shook Lin & Bok, with Mr. R. Brockett and S. Sothi; M/s. Brockett & Cho

JUDGMENT

L.C. Vohrah J:

This is an application on the part of the defendants under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the writ of summons and statement of claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the court. It concerns only the second plaintiff as the first plaintiff has not contested it.

The brief facts relevant to this application are as follows. The plaintiffs were directors of Pandangan Selera Sdn. Bhd. (Pandangan) which was a customer of the first defendant. They became two of the three guarantors for banking facilities granted to Pandangan by the first defendant. When Pandangan defaulted in payments under the banking facilities and when the guarantors failed to make payment as provided for under the terms of the guarantees, the first defendant on 30 April 1987 commenced legal proceedings in this court by way of civil suit No. 23-621 of 1987 (the earlier suit) against them, Pandangan, and the third guarantor. The plaintiffs entered appearance and on 10 May 1988 the first defendant filed an application for summary judgment in the earlier suit against the plaintiffs and summary judgment was entered by the senior assistant registrar on 19 August 1989 against them in the sum of RM7,293,171.91 together with interest at the rate of 12% per annum with monthly rests with effect from 27 April 1987 to the date of realisation and costs. They then appealed against the decision of the senior assistant registrar. The appeal was heard on the merits by Shanker J. over two days on 23 and 24 January 1990 and was allowed and they were granted leave to defend subject to the condition that they either pay into court the sum of RM1,500,000 or give security to the first defendant in a manner acceptable to it for the payment of such sum, the payment or security to be made within 4 weeks from 24 January 1990, the date on which the learned Judge granted the order for conditional leave. The plaintiffs failed to comply with this order and on 18 March 1990 the learned Judge made a further order giving final judgment to the first defendant against the plaintiffs in the sum of RM4,400,000 together with interest thereon at the rate of 12% per annum with monthly rests with effect from 18 September 1986 up to the date of realisation and costs. The plaintiffs then appealed to the Supreme Court against both the conditional order made on 24 January 1990 and further order made on 18 March 1990. The Supreme Court heard and dismissed the appeal against the two orders on 20 February 1991 with costs to be taxed in favour of the first defendant. On 28 February 1991 after the dismissal of the appeal, the plaintiffs filed a notice of motion in the Supreme Court for an order to set aside or vary the two orders of Shanker J. with consequential variation of the Supreme Court order dismissing the appeal on the ground of misrepresentation by the second defendant in the present suit, the Regional Manager (Southern Region) of the first defendant, in his second affidavit in support of the first defendant's application for summary judgment affirmed on 17 November 1988. This notice of motion was heard by the Supreme Court on 20 May 1991 when apparently upon a preliminary objection being taken that the Supreme Court had no jurisdiction to review its earlier decision leave was granted to the plaintiffs to withdraw their application with an order for costs to be taxed in favour of the first defendant. The plaintiffs then filed the present suit seeking to set aside the further order of Shanker J. of 18 March 1990 giving summary judgment against the plaintiffs, the cause of action appearing in paragraph 3 of the statement of claim which for easy reference is set down hereunder:

> 3. The plaintiffs aver that the said judgment dated 18 March 1990 was obtained by the first defendants by fraud by both the defendants and by the second defendant also making a false statement in an affidavit, particulars whereof are as follows:
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> (a) In para 8(o) of an affidavit affirmed by the second defendant on behalf of the first defendants on 17 November 1988, who is the Regional Manager, South Region, the second defendant stated:
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> The purchase of the shares of Oswan from D & C Nominees Sdn. Bhd. was willingly entered into by the 1st defendant and the beneficial owners of these shares there being no coercion or force of any sort being used by the plaintiffs to cause the 1st defendant to purchase these shares. The purchase price of RM1.5 million was made by way of a cheque drawn by the 1st defendant in favour of D & C Nominees Sdn. Bhd.

and after clearance of the cheque the plaintiffs remitted the same to D & C Nominees Sdn. Bhd. who subsequently accounted for the same to the beneficial owners. A copy of the plaintiffs' letter advising D & C Nominees Sdn. Bhd. of the said payment is exhibited herewith and marked as "G8". It is totally illogical to allege that this sum had been used to settle the account of one Chan William as the proceeds of the sale of these shares must be accounted to the beneficial owners of these shares who had transferred them to the plaintiffs' nominees in accordance with the terms of the said loan.

(b) What has been deposed to above is not true in that the first plaintiff who was the beneficial owner of the shares referred therein, namely, 90,000 ordinary shares of RM1 each and 63,000 preference shares of RM1 each, did not receive a single cent from the said sum of RM1.5 million referred to therein even though the second defendant had stated therein that the said sum "must be accounted to the beneficial owners of these shares ...

(c) The learned judge who heard the application for summary judgment had *inter alia* made the following finding (which he would not have made) had it not been for false statement made by the second defendant on behalf of the first defendants as stated in (b) above:

16. Very substantial details of this alleged scheme naming names, dates and places are set out with some particularity in 36 sub-paragraphs of paragraph 7 of the statement of defence (Enclosure 27), which runs into some fourteen pages. It is unnecessary to repeat them here. Needless to say the sting in these allegations have been denied by the Bank's Manager in Johor Bahru.

which finding would not have been upheld by the Supreme Court, had it not been *inter alia* for the said false statement.

(d) If it had not been for the said false statement by the second defendant on behalf of the first defendants as regards that the said sum of RM1.5 million had been accounted to the first plaintiff the first defendants would not have been able to obtain the said judgment.

(e) By the said false statement the first and second defendants deceived the courts and by that deception obtained the said judgment.

(f) The fraud of the first and second defendants would also come within the ambit of s. 17 of the Contracts Act 1950.

It is not disputed that paragraph 3 of the statement of claim relates to an allegation in the statement of defence in the earlier suit concerning a separate loan transaction involving the first defendant, a company called Oswan Corporation Sdn. Bhd. and the payment of the sum of RM1,500,000 being the redemption value of a parcel of shares in Oswan Corporation Sdn. Bhd. connected with that transaction ("the Oswan shares"), the details of which require no repetition in the present application for reasons which will become apparent later. The second plaintiff's complaint in the present suit is that payment of this sum was not made in the manner averred to by the second defendant so that the second defendant had committed perjury and the perjured evidence had influenced Shanker J and the Supreme Court in deciding as they did. It is however the contention of the defendants that the matters before the parties are res judicata including the issue of the Oswan shares because these matters had been raised in the earlier suit and the second plaintiff had every opportunity in the earlier suit to dispute the truth of the second defendant's affidavit (which he is seeking to impugn now) at the hearing before the senior assistant registrar, Shanker J. and again on appeal before the Supreme Court.

The sole question for me to consider in the present application is whether it is now open to the second plaintiff to allege in the present suit that the final judgment entered in the earlier suit was obtained by perjured evidence on the part of the second defendant.

I shall now consider the authorities on the specific issue of actions brought to set aside previous judgments on the ground of fraud, forgery or perjury which have been cited to me on behalf of the defendants. The first is *Kesarmal & Anor. v. Valliappa Chettiar & Anor.* [1954] 20 MLJ 179. This case relates to an action arising out of an earlier suit in which the first defendant was the plaintiff and the two plaintiffs were the defendants. Judgment was given for the plaintiff in the earlier suit and subsequently confirmed by the Privy Council by which it was held that the transfer of land

from the plaintiff during the Japanese occupation was obtained by duress and that the defendants were parties to it or had knowledge of it. The defendants in the earlier action sought to set aside that judgment on the ground that it was obtained by means of fraud, forgery and perjury. The first defendant by notice of motion applied to dismiss the action on the grounds that it was frivolous and vexatious and an abuse of the process of the court and that it disclosed no reasonable cause of action. It was held that the judgment in the earlier suit was res judicata and could only be set aside if fraud were proved and the allegation of fraud could only succeed if it could be shown that this matter was not before the court in the earlier suit or could not with reasonable diligence on the part of the plaintiffs have been before the court. The first defendant succeeded in its application and the action was dismissed on the grounds put forward in the notice of motion.

The next case is *Seng Huat Hang Sdn. Bhd. & Ors. v. Chee Seng & Co. Sdn. Bhd.* [1987] 1 MLJ 413. Here too the defendant applied to strike out the writ and endorsement of claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the court. The main argument of the defendant was that the plaintiffs' claim was barred by estoppel which arose from eight possession orders in civil actions in the Magistrates' Court in which the defendant was the plaintiff and the plaintiffs the defendants. The plaintiffs claimed, *inter alia*, for a declaration that the possession orders were null and void and as having been procured by a fraudulent misrepresentation of a material fact, namely non-disclosure of the fact that the defendant had no title to sue for possession. In granting the application Edgar Joseph Jr. J (as he then was), who had heard the plaintiffs' appeal from the decision of the learned Magistrate refusing to set aside the plaintiffs' application to set aside default judgment for possession entered against them and had dismissed the appeal held, *inter alia*, that there was no fraud on the part of the defendant and that even if there was fraud, the fraud was discoverable and could have been exposed by the plaintiffs in the previous proceedings; and that the plaintiffs were bound by their pleadings in the previous proceedings and were thereby estopped from raising the question of the defendant's want of title which they could have raised in the previous proceedings. The learned Judge had this to say (at p. 421):

> Now, a party cannot, in a subsequent action, raise a ground of claim or defence, which, upon the pleadings, was open to him in the former one ...
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> It is also an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings ...

The third authority cited having direct relevance to the present application is the decision of an Australian appellate court in the case of *Wentworth v. Rogers* (No. 5) [1986] 6 NSWLR 534. The facts in this case require no narration but the judgment of Kirby P, with which the other two members of the Court of Appeal agreed, expounds a number of principles established by law governing proceedings to set aside a judgment on the ground of fraud. In cautioning that the remedy of the peremptory termination of a claim brought to the courts by the striking out of the statement of claim is one to be used only in the clearest of cases, the learned President stated (at p. 538):

> ... it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment ... This rule has an ancient lineage ... It is based upon a number of grounds. **There is a public interest in the finality of litigation. Parties ought not, by proceeding to impugn a judgment, to be permitted to relitigate matters which were the subject of the earlier proceedings which gave rise to the judgment. Especially should they not be so permitted, if they move on nothing more than the evidence upon which they have previously failed. If they have evidence of fraud which may taint a judgment of the courts, they should not collude in such consequence by refraining from raising their objection at the trial, thereby keeping the complaint in reserve.** It is their responsibility to ensure that the taint of fraud is avoided and the integrity of the court's process preserved.
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> (Emphasis added)

Another case of persuasive authority from a foreign jurisdiction which has been cited and

which bears directly on the present application is the Canadian case of *International Corona Resources Ltd. v. LAC Minerals Ltd. McKinnon et al., Intervenors* 54 DLR (4th) 647 where a mining company C brought a successful action against L, another mining company, for taking improper advantage of confidential information. L appealed unsuccessfully to the Ontario court of appeal. Then L moved to set aside the trial judgment on the ground that it had been obtained by fraud, alleging that one of C's witnesses had committed perjury. The motion was dismissed because it was held that in order to set aside a judgment for fraud, a party must prove material fraud established on the basis of fresh information and must act with due diligence, the alleged perjury had not been established and it had not been shown that L had acted with due diligence or on the basis of fresh information. Of the nine propositions listed by Osborne J at pp. 658 to 659 for consideration by the court in determining an application to set aside a judgment for fraud two propositions were stressed on behalf of the defendants, namely that "[t]he evidence of fraud must not have been known at the time of the trial to the party seeking to rely upon it on a motion to set aside a trial judgment", and that "the onus is on the unsuccessful moving party to establish due diligence" to prevent evidence being "stockpiled during the litigation process to be taken from inventory after an unsuccessful trial or appeal."

Having regard to the principles enunciated in the cases referred to above it appears to me that before the second plaintiff can begin to prove his case in the present suit he must satisfy the court that the facts upon which he has mounted his case for perjury against the defendants were not before the court in the earlier suit or that there has been new discovery of fresh material facts which would provide a reason for setting aside the final judgment of Shanker J. made on 18 March 1990. It is clear from the documentary evidence filed in respect of the present application that the facts surrounding the Oswan shares transaction in respect of which perjury is alleged were contained in the statement of defence and in the affidavits in support of and in reply to the application for summary judgment in the earlier suit. The statement of the second defendant which is now being impugned as being false related to facts which were averred to in great detail in the (to use the very words of the learned Judge) "voluminous pleading setting out in some detail the matters on which they relied to exculpate themselves from liability" and were certainly not fresh facts which have been newly discovered. The facts upon which the second plaintiff is now alleging fraud in the present suit were already in issue. This is obvious from the written judgment of Shanker J. in the earlier suit at pp. 23 to 29 of Exhibit J of Enclosure (12A) where it is shown that the nature of the Oswan shares transaction exercised the mind of the learned judge and that, whilst he apparently disbelieved the averments that were deposed to on behalf of the plaintiffs relating to the disposition of the sum of RM1,500,000 realized from the sale of the Oswan shares when he heard the merits of the O. 14 application over 2 days, he in fact gave the second plaintiff the chance to prove his case by allowing him conditional leave to defend. The second plaintiff thus lost by default the opportunity of challenging the veracity or otherwise of the statement in the second defendant's affidavit when he failed to fulfil the condition. It was certainly open to him at the hearing before the Senior Assistant Registrar and at the hearing on appeal before Shanker J. to have specifically alleged fraudulent misrepresentation on the part of the second defendant as regards paragraph 8(o) of his second affidavit in the light of the facts then subsisting. This he did not do and, having regard to the foregoing principles derived from the cases referred to, I take the view that he is now estopped from litigating these matters. I would accordingly consider the present suit as being frivolous and vexatious and an abuse of the process of the court.

Of the authorities cited by learned Counsel for the second plaintiff in support of his right to maintain the present suit, the cases of *Ladd v. Marshall* [1954] 1 WLR 1489, *Skone v. Skone and Anor.* [1971] 1 WLR 812 and *Langdale and Anor. v. Danby* [1982] l WLR 1123 have been relied heavily upon. As was quite correctly pointed out by learned Counsel for the defendants these cases in fact deal strictly with the principles to be applied to a situation where leave is sought to adduce fresh evidence at the appellate stage and not to a situation such as the present where the second plaintiff is attempting to bring a fresh action on the ground of perjury on evidence that was already

available in the earlier suit. Even allowing for the application of the principles enunciated in *Ladd v. Marshall*, and followed in *Skone v. Skone* and *Langdale v. Danby*, the second plaintiff would still have failed the first of the three conditions laid down by Denning L.J. (as he then was) in *Ladd v. Marshall* (at p. 1491) in the following words:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;** secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
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> (Emphasis added)

There is however a point which has been stressed by learned Counsel for the second plaintiff which has to be dealt with. It is his argument that the authorities which have been cited by learned Counsel for the defendants relate to an action for the setting aside of a judgment which had been rendered only after a trial of the action and should not apply to a judgment which was obtained by summary procedure ostensibly because such a judgment was obtained without a full scale hearing. It is obvious from the record that the various matters raised in the lengthy statement of defence and in the affidavits had been carefully considered by the learned Judge who after a full hearing on the merits then gave conditional leave to defend because he considered the defence "suspicious", "shadowy" and "of bad faith" as the plaintiffs were "seeking to overturn formal documents which they had executed because they allegedly participated in some nefarious scheme to get round by deception the criteria laid down by the authorities before a private banking institution can go public" and then only entered final judgment when the condition was not fulfilled. I fail to see how a summary judgment obtained after a hearing on the merits (and which on appeal had been considered and approved by the Supreme Court) is of less efficacy or intrinsic value than one obtained after a trial. As I see it, the crux of this case really is whether the question of fraud or perjury raised in the present suit could have been raised in the earlier suit on the facts then available and it seems to me beyond argument that the answer must be in the affirmative.

In the result, I make an order in terms of prayers 1 and 5 of the application, namely for the striking out of the writ of summons and statement of claim and for costs to be paid by the plaintiffs, fully bearing in mind Kirby P's stricture (*supra*) that the remedy of the peremptory termination of a claim is one to be used with caution and only in the clearest of cases.